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The CHAIRMAN. Gentlemen, the next paper this morning is by Professor Butte, whom we will all be very glad to hear.

Prof. BUTTE. Mr. Chairman and gentlemen: Let me say informally at the outset, that after some study I do not find there are any sufficiently broad or fundamental modifications of the law of visit and search that I care to recommend. So I shall confine my paper to a discussion of the reform of the law of contraband.

THE REFORM OF THE LAW OF CONTRABAND

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By way of introduction, let us note why the problem of contraband has been so perplex and why modification and progress have been and will continue to be so difficult. First, there is the everlastingly rasping conflict of interest between neutrals and belligerents. The two are supposed to stand at opposite poles. The belligerent believes—erroneously, I think,—that his interests are best conserved by prohibiting all commerce of whatsoever character between his enemy and neutrals; and the neutral believes, likewise erroneously, that the war ought not to affect his trade at all. Of course, neither of these maxima is in practice attained. But with each new war the same general issue arises, and neutrals and belligerents, like the heroes in Valhalla, “hew each other in pieces only in a twinkling to be reunited for other bloodless and indecisive contests.”

Again, maritime Powers generally are reluctant to define precisely and formulate legally the relations of neutrals and belligerents lest in particular cases or by accidental circumstances *summum jus* is transformed into *summa injuria*, to the disadvantage and peril of one belligerent and a corresponding gain to his opponent. Lawrence gives us a striking instance of it in his account of how the neutral states furnished the Russian fleet with coal all the way from the Baltic to the Far East to the imminent danger of Japan; whereas Japan, though as a matter of right the same courtesy would have been extended her, had no intention of sending cruisers to the Baltic. Maritime Powers are far-sighted. Even when neutral they keep ever in view the possibility of their becoming belligerents, as may be seen throughout their discussion of the proposed International Court of Prize. They

find it all in all to their best interest, from this twofold viewpoint, to keep the law of maritime warfare in general and the subject of contraband in particular very elastic. Indeed, the rapid economic changes in our era and the amazing advances in invention and in the modes of warfare make a rigid codification of the law of contraband almost impracticable.

The situation is rendered still more hopeless in the light of recent painful manifestations of the doctrine of *necessitas belli*, (*Kriegsräson*). Given vagueness and uncertainty in the law of war, and the doctrine of necessity, the belligerents find their warrant to do almost anything. Nay, more, given the most complete and perfect codification of the law of war by international treaty, and the doctrine of necessity; the result is the same. This doctrine is nothing new in our science. Grotius stated the principle: *omnia licere in bello, quae necessaria sunt ad finem belli*; and it has since received the support of eminent authority and the sanction of practice by many nations. It is often asked *arguendo*: In the face of the stern realities of naval war, in the face of relentless forces, in a death struggle, which will a nation consult to save itself, the necessities of its situation or the printed rules? War is not a sport. *Recht ist was gilt*, says Niemeyer. Rules for the conduct of war agreed upon in time of peace are essentially merely proposals to future unknown belligerents. Have not the instances of the ruthless violations of the rights of neutrals during the present war borne out that this is the construction in fact accepted and followed? Is it or is it not next to futile to attempt to tie the hands of belligerents by a written rule, when the hope of victory is thereby put in the balance against the observance of the rule and the advantage of the enemy? *The law of war is made by and during war*. Failure to appreciate this fact and the want of coöperation among neutrals during war has resulted in this: *the law of war is enacted by belligerents*. Is it not high time neutrals were claiming a more effective part in the matter?

Another factor that has impeded reform of the law of contraband is the overwhelming naval supremacy of a single nation. Great Britain potentially rules the seas. No modification of the law of maritime warfare by international convention can be made without her consent. This is demonstrated beyond a cavil by the fate and failure of both the International Prize Court Convention and the Declaration of London, not to mention other similar beneficent conventions. She will give her consent to naval reforms only when she finds it to her

interest, or when she is coerced (of which there is no immediate prospect). These are obvious facts and the statement of them here is not meant as a criticism in the slightest degree; doubtless no other nation similarly situated would act differently. But these facts must be taken into account; otherwise our discussion this morning would be Utopian and fruitless.

What Barboux declared forty years ago is still true: "*Qui oserait considérer comme un principe de droit maritime un usage auquel l'Angleterre refuserait de se conformer?*"

An examination of the decisions of the British prize courts will disclose that "they have with rare exceptions proceeded in the direction of extending the list of contraband to its widest possible limits" in step with the rise of England's naval power. When that power was not so formidable, we find Sir Leoline Jenkins refusing to recognize the contraband character of tar and pitch and declaring that only "what is directly and immediately subservient to the uses of war ought to be regarded as contraband." "A century later," in the language of Atherly-Jones, "when the naval power of England had again become formidable, we find pitch, tar, hemp, sails, sailcloth, masts, copper, sheathing, anchors and practically every article of ships' equipment adjudged to fall within the category of absolute contraband." "The policy of the English Court of Admiralty," says Atherly-Jones, "has been in the direction of extending the rights of belligerents rather than in that of protecting the rights of neutrals." Gentlemen, all law is a restriction upon liberty of action, and it is not to be presumed that Great Britain, so long as she retains her great naval supremacy, will desire to curtail considerably her liberty of action on the sea during war to the incidental advantage of her foe. The abuse in the present war of the power conferred by that naval supremacy (under the pretense of retaliation) against which the United States so tardily but so vigorously protested in October last, ought to be illuminating to those who expect Great Britain to lead (as she must, if anything at all is accomplished) in the adoption of any important changes for the better in the law of maritime warfare.

The prospect of any essential reform is dark. It is almost hopeless, as I now reluctantly see it, if we work only along the same lines as heretofore. We must take a new tack.

I. For the purpose of this discussion, which will not, necessarily, indeed can not, concern itself with details, we shall assume that the Dec-

laration of London, Chapter II, Articles 22-44, states substantially the accepted principles of international law and practice relating to contraband of war.¹ The leading Powers now at war profess to follow it, with some modifications which apply chiefly to the list of articles enumerated as contraband. Parenthetically let me remind you that the so-called analogues of contraband, military persons and dispatches, are quite properly omitted from the chapter on contraband in the Declaration of London and treated separately as *L'Assistance Hostile* (Un-neutral Service). They will, therefore, not be embraced in our discussion. Let it also be recalled that the program of the Naval Conference of London contemplated only the statement of principles of international law then generally accepted, and not the enactment of modifications or reforms.

II. Three vital modifications of the law of contraband have been proposed in recent years: (1) the abolition of the principle of contraband *in toto*; (2) the abolition of conditional contraband only; (3) an international agreement for the prohibition by neutral states of the export of contraband from their territory. The agitation for the immunity of all property from maritime capture has always excepted contraband, so that this reform is not relevant to our discussion.

1. The abolition of the principle of contraband *in toto* was advocated by the British delegation in the sessions of the Fourth Committee of the Second Peace Conference at The Hague, July 24, 26, 31, 1907. At the opening of the Conference, the British submitted the following declaration:

In order to diminish the difficulties encountered by neutral commerce in time of war, the Government of H. B. M. is prepared to abandon the principle of contraband in case of war between the Powers which may sign a convention to that effect. The right of visit would be exercised only in order to ascertain the neutral character of the merchantman.

In support of this declaration an array of arguments was used which are more significant of the present deplorable condition of things than convincing of any real merit in the proposal. As summarized by Westlake they were:

¹For these articles, see SUPPLEMENT to the AMERICAN JOURNAL OF INTERNATIONAL LAW, Vol. III, pp. 197-207.

That profound doctrinal and practical differences exist as to contraband, especially as to the treatment of things which are not absolute contraband in the strictest sense, and that a codification of the law was hopeless—that the progress of science has increased the number of things which in certain circumstances are of use in war though not absolute contraband in the strictest sense—that the complaints of neutrals on account of interference with the trade in things of that class have consequently increased—that the complexity of the cargoes carried by modern merchantmen of large size makes the search in them for contraband goods difficult and vexatious—that further difficulties would arise if a ship accused of carrying contraband was allowed to proceed on her voyage, the alleged contraband being transshipped or destroyed—that the destination of contraband to the enemy is often difficult of proof, and that under the doctrine of continuous voyage a belligerent might almost entirely interrupt neutral commerce—that for all these reasons the principle of contraband is the source of great damage to trade in non-contraband goods, and that neutrals demand indemnities so large that prize courts refuse them—that during the Russo-Japanese War only the tact of the parties concerned prevented serious international results arising from the principle of contraband—that belligerents derive no compensating benefit from that principle—and that to abandon it would be a work of peace and justice.

If these arguments appear superficial and opportunist, Kleen in his *Lois et Usages de la Neutralité* (1898), in advocating a reform identical with the British declaration argues more from principle. A belligerent, he assumes can not under present law extend his defense against the traffic in contraband to the territory, to the soil of neutrals, nor interfere in any way within a neutral state in the production, sale or transport therein of any articles of commerce, for that would be a violation of the sovereignty of the neutral state. The same reasoning, he argues, applies to articles on board a neutral ship flying the neutral flag, for a ship is but a *portion flottante* of the state whose flag it flies. "*Une marchandise transportée par un navire se trouve, au point de vue du droit international, dans les frontières de l'Etat pacifique auquel ce navire appartient, et où sa qualité de contrebande ne signifie, selon le système qui règne, encore rien.*" Hence, no such goods, whatever their character, are contraband until they are actually delivered into the hands of the enemy. To prevent such delivery, Kleen leaves the belligerent the right of blockade.

Neither Kleen nor the proponents of the British declaration mention

what seems to me the main point, namely, the inherently illicit nature of the traffic in contraband from the standpoint of the neutral's obligation, and its inherently dangerous nature from the standpoint of the belligerent's vital interests. Kleen would compensate the belligerent for the deprivation of his present means of suppressing the traffic in contraband by imposing on all neutral states the duty of prohibiting the export of contraband. Neither did the advocates of the British declaration mean that a belligerent must forego all rights to prevent the transport and delivery of contraband to his opponent. They had in mind as a substitute for the present system the permission to belligerents to appropriate to their own use any intercepted articles they deemed proper, subject to the obligation of making reasonable compensation; in short, the right of preëmption. The same plan is to be found in Article XIII of the famous treaty of 1785 between the United States and Prussia. By this plan the penalty of confiscation for an *illegitimate commerce which ought to be suppressed*, would be repealed; and the way opened, it seems to me, to an unlimited interference with all legitimate commerce, which needs to be more effectually protected. The British proposal failed in the Hague Conference owing to the nonconcurrence of the United States, France, Germany and Russia.

2. The abolition of conditional contraband is recommended in Article IV, paragraph 12, of the *avant-projet* adopted by the Institute of International Law at Venice in 1896. The abolition should extend to all that "pretended contraband" denominated *relative*, *i. e.*, articles *usus ancipitis*, capable of being used by a belligerent for military purposes but ordinarily only used for peaceful purposes; and also the so-called occasional contraband (*contrabande accidentelle*), *i. e.*, articles serviceable in military operations only in very exceptional circumstances. As a qualification of the abolition of conditional contraband, the plan of the Institute reserves to the belligerents the right of preëmption. The remedy is worse than the malady. The excessive interference with innocent neutral commerce sure to follow from the legalized exercise of this right, and the uncertainty as to what is a reasonable compensation for goods appropriated and when and how it will be paid and the probability of litigation and delay, offset any advantages of the plan.

In the Second Peace Conference, the United States formally declared that it was in favor of the complete abolition of conditional

contraband, but no action was taken thereon. Proposals to the same effect were contained in the preliminary memoranda of Austria-Hungary, Spain and The Netherlands in the London Naval Conference. When the delegate of The Netherlands, Admiral Roell, in the second session of the Conference on December 7, 1908, offered an amendment looking to the elimination of conditional contraband from the *bases de discussion*, it was soon manifest that there was no hope of its acceptance. The Declaration of London not only perpetuated the institution but extended it.

As long as the belligerents retain the power to decide in the first and last instance what is liable to confiscation as contraband, the distinction between various classes of goods has little practical value. Of course, it leaves the neutral the possibility of proving to the satisfaction of the belligerent's prize courts that his goods were innocent conditional contraband, and of obtaining reimbursement for their value at the end of a long and expensive litigation. But even that is for *him* always a losing game. For the *belligerent*, conditional contraband is an endless source of confusion and controversy. He will always resolve the doubts as to whether the goods in question are prohibited or not, in his own favor anyway; then why not in candor at once declare all questionable goods as absolutely prohibited? A stroke of the pen will suffice. Why hold out false hopes to neutral merchant traders? Conditional contraband is a sham concession. Certain articles are always contraband and certain articles are never contraband, and all other articles are contraband in the discretion of the belligerents. Conditional contraband is a fictitious classification,—a mere play upon words without content or meaning. It ought to be dropped. But whether it is or not does not make much difference. To abolish it is merely abandoning a name. The only free commerce belligerents should allow and neutrals should demand is the commerce in articles that are never contraband. If I read the signs of the times aright, that is what we will come to. The free list is the only list that should appear in any future international naval convention as to the law of contraband.

3. An international convention for the prohibition by neutral states of the traffic in contraband by their subjects has been suggested by a number of publicists and agitated occasionally in the public press, but so far as I know the suggestion has not been officially advanced or supported by any state in recent years. The principle of it is sound and

right. But such a prohibition is now rare in national legislation and it seems impracticable to attain this reform through international convention. Article 7 of Convention XIII of the Second Peace Conference, which has been ratified by twenty-five nations, states the present international law on this subject:

A neutral power is not *bound* to prevent the export or transit for the use of either belligerent, of arms, ammunition, or, in general, of anything which could be of use to an army or fleet.

The matter is thus left optional with the neutral states. To get the whole community of nations to about-face on this point and make the enactment of prohibitory statutes obligatory is next to impossible, though some states, instructed by current experience, have doubtless suffered a change of heart on this issue. After the outbreak of the Franco-Prussian War, the Prussian Minister in London demanded that Great Britain should intercept and prohibit the shipment of arms to France by British subjects. Commenting on this, Westlake in 1870 expressed the opinion that "the only means of escaping this difficulty is to set up a list of articles of contraband by a general convention adopted at the same time as the rule prohibiting the export thereof by neutral subjects." But he had no hope of any international agreement either as to the definition of contraband or as to joint coöperation in prohibiting traffic therein. Kleen, in 1893, in a series of articles in the *Revue de droit international et de législation comparée* (Vol. XXV), and again in 1894 in the Paris meeting of the Institute of International Law suggested the same idea. He proposed a universal international treaty which should establish a list of articles of contraband (subject to change only by a similar treaty) and which should bind neutral states to prohibit by identical statutes the export of the articles of contraband thus determined. As we have seen, there is no reasonable prospect of the early adoption of such a proposal. But is there *nothing* that can be done along this line of reform?

III. Gentlemen, I venture to recommend the enactment by all nations, or as many as will, of such prohibitory statutes, without previous international agreement, as a matter of individual action. This plan presupposes concerted and similar action, but not an international treaty nor necessarily identical statutes. Each nation determines for itself what articles are contraband and prohibits the sale and the export thereof by sea and land. Of course, articles always contraband, such

as arms and munitions of war and other articles directly useful in battles, will appear on all the lists. The lists might well be left elastic so that they may, if desired, expand to conform to the lists of the belligerents. What more effective remedy can be found for the suppression of this illicit traffic, with all its train of evils, than that of *stoppage at the source*? Let us examine what may be said for the proposal that neutral states should prohibit the export of contraband to the belligerents.

1. It is right. The highly artificial distinction now drawn between the duty of the state, as such, not to furnish a belligerent with munitions of war or other contraband, and the absence of any such duty on the part of all its citizens, is a hybrid of very recent origin. It is one of the very few unhealthy products of the modern interdependence of states. That this distinction between the duty of the people and the duty of the state has become more firmly established since the rise of democracies and the increasing identification of the people with the state is one of the anomalies of history.

If we go back before the period of the expansion of modern overseas commerce, we never find in the definitions of neutrality *one kind for a state and another kind for the body of its citizens*. So, for example, Bynkershoek tells us in general terms: "*Optimo jure interdictum est ne quid eorum (contraband) hostibus subministramus; quia his rebus nos ipsi quodammodo videremur amicis nostris bellum facere*" (Quaes. Juris Pub. L. I. C. 9). Grotius (L. III. 5—2, *De Jure belli ac Pacis*) and Gentilis (L. III. C. 22, *De Jure Belli*) both tell us that the citizen of a neutral state who furnishes contraband to the enemy is *to be deemed an enemy*. "He is a member of the enemy's army who supplies to that army the necessities of war," *i. e.*, whether he be king or subject (Gentilis). "He who furnishes to an enemy articles of the first class (absolute contraband) is a direct partaker in that enemy's war" (Grotius). Gentilis discusses the liability of neutral states for the acts of their citizens in thus violating the rules of international law. He comes to the conclusion that a neutral state, *as such*, can not be held to be primarily guilty of any offense; but it owes the injured belligerent the duty of extraditing the guilty individuals or punishing them itself. To refuse to do this is to be guilty itself of a breach of international faith (*laedi publicum foedus, si expresse neget universitas laesis satisfacere*). He goes further and maintains that the neutral state itself is directly and immediately re-

sponsible *pro delictis civium non momentaneis, sed successivis continuitatis* (i. e., for the continual export of contraband by its citizens to the enemy), *si et scivit et potuit prohibere* (if it knew of it and could have prevented it).

As maritime commerce increased it became apparent that it was impracticable and harsh for belligerents to treat as enemies the officers and crews of neutral merchantmen that happened to be transporting contraband as a portion, however small, of their cargo. Neutrals, too, especially the Dutch, in the course of the seventeenth century, were demanding a greater liberation of commerce. Some were asserting that the freedom of the seas extended to the right of unrestricted commerce in everything, even including contraband. The result was that only confiscation was retained as the penalty for the transport of contraband by neutrals, and the right to treat the guilty individuals as public enemies was abandoned in the course of the seventeenth century. But this change did not alter the opinion of the civilized world as to the viciousness of the traffic in contraband and its essentially un-neutral character, as is demonstrated by the large number of treaties concluded during this period for the suppression of the traffic. In these treaties each contracting nation expressly agrees to prohibit its subjects from transporting or furnishing contraband wares to the enemy of the other party during war. A partial list of these treaties is as follows: 1604, Great Britain and Spain; Great Britain, Spain and Burgundy; 1614, Sweden and The Netherlands; 1625, Great Britain and The Netherlands; 1654, Great Britain and the United Provinces; 1656, Great Britain and Sweden; 1670, Great Britain and Denmark; 1691, Great Britain and Sweden.

In the eighteenth century treaties imposing this duty on neutral states are rare, and in the nineteenth century they have disappeared entirely.

The disappearance of these treaties evidences the change that seems to have taken place in the conscience of the civilized world as to the inherent wrong of the traffic in contraband by the subjects of neutral states. We still find, however, lingering traces of the older and truer conception of the neutral state's duty to frown down upon this traffic. In the British neutrality proclamations, as late as the one of April 3, 1877, the sovereign warns his "loving subjects that if any of them shall presume in *contempt of this our Royal Proclamation and of our high displeasure*, to do any acts in derogation of *their duty*

as subjects of a neutral Sovereign—as more especially by carrying officers, soldiers, dispatches, arms, ammunition, military stores and materials, or any article deemed to be contraband of war according to the law or modern usage of nations,” the offender will incur the penalties of international law and “*our high displeasure by such conduct.*” The illegality of such acts is here denounced, but no steps are taken in the British laws to prevent or punish them. The more recent British neutrality proclamations (as, for example, the one issued in 1911 at the outbreak of the Turco-Italian War) omit all reference to “our high displeasure” and to the illegality of the traffic in contraband.

Fortunately, however, not all neutral states content themselves with warning their subjects against the existing penalties of the law of nations for carrying on a “lawful” business. Many states in recent years have, from different motives, prohibited the export of contraband from their territory during war. During the Crimean War, Prussia enacted such a prohibition; during the Franco-Prussian War, Austria-Hungary, Belgium, Denmark, Japan, The Netherlands, Spain, Sweden, Italy; during the Spanish-American War, Brazil, (what a noble example our American sister has been to the world in her legislation as to war!) Denmark, Japan, The Netherlands and Portugal. On April 22, 1898, the United States enacted a law authorizing the President to prohibit “the export of coal or other material used in war” which continued in effect until repealed by implication by the Act of March 14, 1912. This power vested in the President was exercised on October 14, 1905, when President Roosevelt prohibited the export of arms and munitions of war to the Republic of Santo Domingo. During the present great conflict, every neutral nation of Europe has prohibited the export of contraband, most of them to a sweeping extent.² The tendency is now to make the enactment of such prohibitory acts a matter of individual action. Our plan would leave it so. But we would have the prohibition adopted as a fixed policy by permanent legislation.

By present international law and practice, as usually stated, the sale or export of contraband is unlawful only (1) when made by the public

²Besides these instances, Prussia in 1863 prohibited the export of arms and munitions into Poland during the revolution there; France, under the law of July 14, 1860, put an embargo on arms in 1873, 1875, 1876 during the Carlist uprisings in Spain; the United States on March 14, 1912, enacted a law authorizing the President to prohibit the export of arms to American revolutionary governments.

authorities of a state professedly neutral, (2) when the individual citizens of a neutral state refuse to furnish the same aid to both belligerents on the same terms.³ (3) When a national law is thereby violated.

We have gone somewhat into history in order to show that we have broken away in practice from an older and juster conception of the inherently hostile and wrongful nature of the act of professedly neutral citizens who furnish arms or other contraband to either or both of the belligerents. But if this notion no longer governs in modern practice, it has nevertheless still its ardent supporters in the science of international law. Among those who believe it right in principle for neutral states to prohibit the export of contraband may be mentioned at random Field, Gessner, Woolsey, Phillimore, Cussy, Hautefeuille, Pistoye, Duverdy, Brusa, Kleen and Bluntschli. *Contra*, Lampredi, Vattel, von Martens, Heilborn, Pradier Fodéré, Klüber, Twiss, Westlake, Perels and von Bar. A great many authorities express no opinion upon the subject as *lex ferenda*, confining themselves to *lex lata*.

Gentlemen, the essence of neutrality, whether of the state or of its citizens, is indifference. The whole duty of a neutral is neither to aid nor to hinder either or both of the belligerents. Can the state (which is after all only a concept) be neutral and its members be unneutral? Should any state professedly neutral tolerate acts of a hostile nature on the part of its citizens toward either or both of the belligerents? Right reason says emphatically, "No." In fact, *most* hostile acts are *now* prohibited by national law. Why not the traffic in contraband? Westlake wrote in 1870 that the truest test of neutrality consisted in "*ne point se départir pendant la guerre des habitudes contractées pendant la paix.*" This is an impossible ideal so far as the belligerent is concerned; and the violent change in his condition makes it impossible for the neutral to continue with him "*les habitudes contractées pendant la paix.*" However, the application of this test would require the enactment of a law confining the trade in wares made contraband by war to the dimensions of the trade in such articles in time of peace. Such a law would be utterly impracticable. Westlake, further arguing against the enactment of a law prohibiting the export of contraband, supposes this case: that an unarmed man is attacked by an armed man

³*Cf.* the statement of Chief Justice Chase in the case of the *Bermuda*, 3 Wall., 514.

before the shop of an arms merchant. If the merchant is willing to sell arms to others, but refuses to sell to the unarmed man until the fight is over, or to lend him any assistance against his aggressor, I believe, says Westlake, he would hardly be deemed to be a neutral; especially if five minutes before he had sold the aggressor the weapon with which he made the attack. But suppose the fight occurred before the shop of a baker, and the baker furnished a gun to the unarmed man, we should say that the baker took sides in the fight. Westlake adds, "I am far from supposing, however, that the legal conditions of neutrality between nations can be put on the same footing." He spares us the necessity of combating any deductions that might be made from the case. Is not Lord Grenville's analogy a truer one? "If," said he, "I have wrested my enemy's sword from his hands, the bystander who furnishes him with a fresh weapon can have no pretense to be considered as a neutral in the contest."

But, it is said, we demonstrate our impartiality by requiring the state to help neither belligerent and by requiring its citizens to help both belligerents without discrimination. It is an assumption that neutral citizens who sell contraband to *one* belligerent may not refuse to sell to his enemy on the same terms. But it is only an *assumption*. I know of no law to which individuals are subject that makes such a requirement of them. And if there were one, it could not be enforced. We know that in practice and by reason of circumstances beyond their control, citizens of a neutral state never aid the belligerents equally and seldom aid more than one side at all. It is not a question of *aiding* both sides equally but of *wronging* both sides equally. How can a neutral aid both belligerents equally without being guided by their respective needs, or wrong them equally without being guided by their respective ability to withstand the wrong offered to be done?

Where is the consistency in prohibiting the export of food supplies to warships and tolerating the export of cannon and dynamite to the land forces? You recall the terminological contest between the German and the American Governments in January of this year about hydroaeroplanes. If a hydroaeroplane is a "*vessel*," its export must be prohibited by a neutral state; if it is an *aeroplane*, it goes free. Under either description it is absolute contraband; and the use to which the thing itself will be put by the belligerent is the same whatever it is called. Thus are we trifling with principle.

The theory that there can be in principle one kind of neutrality for

a state and another kind for its subjects, and that it is the bounden duty of the state to prohibit the sale and export of certain kinds of contraband wares and not of others, has proven difficult to reconcile with the basic principles of the science of international law. Most writers shrug their shoulders and say with the Germans: *Es ist nun einmal so*. Creasy says "that the neutral state is not bound to apply its municipal law, or the machinery of its executive, to the prevention of contraband traffic." This, he says, is "*an exception* to the general principle of jurisprudence according to which every civilized nation is bound to treat the rules of international law as incorporated with its own national judicial system." Gentlemen, if *international law* imposes a duty upon neutral states, *by what authority may they disregard it?* Oppenheim asserts that "individuals derive neither rights nor duties, according to international law, from the neutrality of those states whose subjects they are. The duty of subjects of neutrals to comply with the injunctions of belligerents (against the carriage of contraband) is a duty imposed upon them by these very injunctions of the belligerents and *not by international law*." (Vol. II, p. 364.) This is an amazing doctrine. To explain away the anomaly of a neutral state's prohibiting its subjects from committing "certain acts" and allowing them to export contraband, Oppenheim invents a third sort of legal subjection of neutral individuals, namely, subjection to the national law of the belligerents. On another page he writes, it is "*the municipal law of the belligerents* which makes carriage of contraband illegitimate and penal." He continues:

The question why the carriage of contraband articles may nevertheless be prohibited and punished by the belligerents, although it is *quite legitimate so far as international law is concerned*, can only be answered by a reference to the historical development of the law of nations.

It is this irrational assumption that neutral citizens can be legal subjects of belligerent states and are instructed as to their rights and duties by the "injunctions" of the belligerents, that lies at the base of all the controversies and misunderstandings about contraband. But Oppenheim can not explain why that which he assumes to be *legitimate* by *international law* should be *penalized* by *municipal law*; and he, too, makes his escape by the German route of *es ist nun einmal so*.

However we may attempt to disguise the fact by artificial distinctions and casuistic theories, it remains one of the eternal realities that

a state is responsible in some form or other for whatever is done within its jurisdiction. A body politic is responsible for the acts of individuals composing that body politic, which originate within its jurisdiction and are acts of actual or constructive hostility towards a nation or nations with which such body politic professes to maintain relations of friendship or neutrality. (Cf. Phillimore, Vol. III, p. 218.) The fact that such acts have been or may be condoned by the injured friend, does not detract one jot or tittle from the soundness and rightness of the principles we have stated.

2. Another reason for the enactment of such prohibitory legislation by a neutral state is that it would conform to the just and lawful requirements of the belligerents themselves. All belligerents denounce the transport of contraband to the enemy under severe penalties, which they are authorized by international law to inflict upon guilty neutrals. It is true each belligerent tries constantly to seduce neutrals with the fascinating prospect of huge and unnatural profits into the hazards of this illicit traffic; but he does not and can not require them to engage in it.

3. The enforcement of such prohibitory statutes by neutral states would be an act of humanity toward the struggling belligerents, unless we are prepared to accept the Bernhardian philosophy of war. For neutrals to supply both belligerents without discrimination with the most noxious forms of contraband, means simply and inevitably, where brave and spirited nations are concerned, the prolongation of the war until one, or perhaps both of the belligerents, shall be bankrupt in resources or well nigh exhausted of fighting men.

4. Such prohibitory statutes should be enacted for the further reason that the traffic in contraband is immoral *per se* when engaged in by a neutral that is indifferent as to the issues of the war and animated solely or chiefly by the hope of making money. This is a distinctively Grotian argument, but such as ought to appeal to a legislator.

5. The traffic in contraband by professedly neutral citizens being denounced and penalized by the law of nations, the constant repetition of the offense, when successfully consummated, creates a general disrespect for the rules of international law and a secret contempt for the science.

6. The traffic in contraband, when carried on in spite of the dictates of humanity and morality and in evasion of the law, tends to lower the national ideals of the neutral peoples tolerating it.

7. By the enforcement by neutral states of such prohibitory statutes, the belligerents themselves would be largely relieved of the necessity of maintaining blockades and of policing the seven seas for the interception of contraband. The forces thus relieved would be free for other and more purely military actions. Nor would there be so much likelihood of friction between neutrals and belligerents as to warships hovering about neutral coasts to the great annoyance of neutral commerce and the irritation of susceptible neutral governments. For the further assurance of the belligerents, the plan proposed does not deny the belligerents the remedies they have under the present system.

8. The present system, whereby only the transport of contraband by sea is illegal and punishable, whereas the transport of contraband by land is unregulated, is in a sense unfair to the maritime states, particularly the two island kingdoms of Great Britain and Japan. The maritime states should not be put at a disadvantage in this respect, if we would have their coöperation. They have now no means of protecting themselves against the transport of contraband overland. This need would be met by the stoppage-at-the-source plan.

9. The enforcement by neutral states of laws prohibiting the export of contraband from their territory, would simply and neatly anesthetize the hated doctrine of continuous voyage. I believe the doctrine of continuous voyage sound, though it has been greatly abused in practice. The belligerent has the right to demand that a neutral state should not submit itself to be used as a gateway or thoroughfare for the transport of contraband to his enemy; and this, too, whether the goods come from a neutral over the seas or from a neutral in a contiguous state. With the stoppage-at-the-source plan in effect, what would it profit the vendor of contraband to violate the laws of his own country by making a false statement that the ultimate destination of the goods is a neutral state, when that very neutral state likewise prohibits the export of such goods to the belligerent? Thus the neutral state instead of offering itself as a possible channel for the fraudulent and illicit traffic in contraband, actually interposes a wall against it. This leads naturally up to my next point.

10. As a result of the enforcement of such prohibitory statutes by neutral states, their legitimate commerce in non-contraband, both with other neutrals and with belligerents, will be freer and safer. Under present conditions, the captor always acts on the presumption that a neutral ship bound for an enemy port or a neutral port near enemy

territory is transporting contraband. Except when under convoy, such vessels carrying a mixed cargo are presumed guilty. Their innocence must be established by a visit and search; their manifest and other papers have little or no probative value. Under modern conditions, with large ships and large miscellaneous cargoes, the search of each vessel consumes many hours, and not infrequently can not be carried out on the high seas at all. The neutral ship is often taken into the belligerent's nearest port and detained there for days to be unloaded and reloaded, to the great damage and loss of neutral shippers and shipowners. So long as neutral states allow the export of contraband from their shores, it seems that they have no just grounds of complaint against a thorough search of each vessel intercepted by the belligerent, however long it may reasonably require and whatever the means that may be reasonably necessary. *The belligerent must obtain for himself the assurance that neutral states now fail or refuse to give.* Surely the belligerent would be glad to be relieved of the burden, the liability, and the endless difficulties and controversies with neutrals connected with the execution of these minute searches, if he had some assurance upon which he could rely that no contraband was put aboard ship in neutral ports.

By the enforcement of such prohibitory statutes, neutral maritime commerce would be safer, because the risk of confiscation of ships or of condemnation to pay expenses and costs because of contraband found on board would be almost entirely eliminated; and delays and losses to a shipper of innocent goods in the same vessel would be avoided. A shipper of innocent goods can not feel safe under the existing rules and the uncertainties as to the doctrine of infection. How is he to know when he sends his goods on board (unless he owns the ship himself) whether contraband will be carried, and if so, what proportion by value, weight, volume and freight of the whole cargo? And *who* knows what proportion in law infects the ship and renders it liable to confiscation? His goods may be thrown out at the first convenient port; and it is incumbent upon him to recover them and to reload and reship them, if he can find the space, at his own expense. He has no recourse against the captor for the interruption of his trade, the damage to himself or his customers, or for other losses by reason of the delay. In many cases, especially if his goods are perishable, he is fortunate if he recovers a fraction of their value.

Further, the prohibition of the export of contraband from neutral

states would tend to restrain the belligerent from arbitrarily extending the list of contraband articles. So far-reaching and vital is the modern industrial and economic interdependence of states, that belligerents can not afford *themselves* to be deprived of those articles that they denounce as contraband when carried to their enemies. *There is to my mind no weapon of defense against the arbitrary extension of the list of prohibited articles by belligerents, so practicable and so effectual as for a neutral to fall in with the "injunctions" of the belligerents themselves and prohibit the export of those articles that both belligerents pronounce contraband.* Each belligerent would reflect long before he added to his list articles other than those always contraband by the common consent of nations. Great Britain would under no circumstances put cotton on the list of absolute contraband if the United States had a law prohibiting the export of contraband.

11. The prohibition of the export of contraband would remove the cause of the bitterness of feeling on the part of belligerents against whom contraband and munitions of war especially, furnished by professed neutrals, are used; and would therefore strengthen the bonds of international peace. Since the currency of the false teaching that neutral trade is not and ought not to be affected by war at all and must be unhampered at all hazards, the resentment of wronged belligerents has waxed in intensity. The diplomatic history of the past two hundred years records numerous angry protests, bordering at times on threats of war, of belligerent states against the traffic in contraband by neutral citizens—a traffic which, when they were neutral, the protestants themselves tolerated freely and justified with a smug Pharisism. Sow to the wind and reap to the whirl-wind! Germany and Austria are now reaping the fruits of this iniquitous and shifting policy. Who will reap next? This traffic in contraband, when carried on by individuals to such a large extent as to make a neutral country practically a base of supplies for the enemy, may arouse such deep resentment as to provoke war, if the offended belligerent is convinced he can win. Ordinarily he is powerless. But can a neutral state ever wisely allow its national peace to be put in jeopardy for the pecuniary gain of a fraction of its citizens who engage in commercial adventures of this sort against the explicit warning of their country? Even when the resentment of the injured belligerent can not vent itself in open hostility, his bitterness survives the war; and it may long impede the way to cordial international understanding and sympathy, and

international coöperation in good works. What an unspeakable misfortune!

On the other hand, how different it would be if all neutral states and their citizens in every way could be governed in their conduct by Jefferson's policy as outlined in his message of October 17, 1803; "In the course of this conflict let it be our endeavor, as it is our interest and desire, to cultivate the friendship of the belligerent nations by every act of justice and of innocent kindness." A people animated by a genuine desire to cultivate the friendship of both belligerents, demonstrated in acts of justice and innocent kindness towards them, will find the belligerents quick to adjust amicably any differences with them, and ready at the proper time to accept their good offices and to trust them as honest mediators. Are the profits to be got out of the traffic in contraband worth what it costs to keep this traffic open?

12. Lastly, the plan here proposed can be adopted readily because it does not require universal assent or any form of international treaty, which were the prerequisites that defeated the acceptance of Kleen's proposal in the Institute of International Law. As stated, however, to get our plan launched, some informal concert of action is presupposed, that is, it is presupposed that a number of states, on the initiative of some one or more, would informally consult as to the principle, and decide upon the advisability of the enactment of such national laws. It may be taken for granted, if the plan is accepted in principle, that a considerable number of nations would enact such prohibitory statutes. Nor must the statutes of the various nations embodying the principle of prohibiting the sale and export of contraband, necessarily be identical, either as to the articles included as contraband or as to the modes of enforcement, which was another prerequisite of Kleen's plan that made it impossible. It is enough that they agree as to the essentials, as they certainly will.

Being the national enactments of independent nations and of a self-denying character, their validity can not be called in question by the belligerents in future wars. Allies held to "benevolent neutrality" (which is no neutrality at all) would probably have to be excepted from the operation of such statutes for obvious reasons. With the principle once accepted and a beginning made by a number of states, these states will enjoy the benefits of the new system; and those neutrals not adopting it will in future wars surely be the object of special suspicion and of specially harsh repressive measures. They can not

expect to receive the moral support of those neutral states that have prohibited the traffic in contraband. It is confidently believed the plan once fairly initiated would be adopted by all states desiring to be truly neutral in future conflicts.

Now let us examine the objections that have been made by various writers against the general proposal to prohibit the sale and export of contraband.

It would result in loss of trade to the neutral states. It would be expensive and difficult to enforce. It would prove inquisitorial and vexatious to neutral shipping. There is some truth and some error in all these objections. It is further urged that the risk of confiscation and the other penalties now sanctioned by international law are sufficiently efficacious to prevent the traffic in contraband. Facts do not sustain this argument. It is said again that by the general enactment of such prohibitory statutes by neutral states, the practice of prohibiting and punishing the export of contraband, which is now optional with neutral states, will develop into an international obligation and a rule of international law. This is precisely what it is hoped will be accomplished. But, it is urged, such an international obligation to prohibit the export of contraband will increase the neutral state's liability to the belligerent, and belligerents will raise frequent complaints against the laxity of the enforcement of the law by neutrals. What a spectacle! A belligerent on his knees to a neutral begging for protection! It ought to be tried just for the novelty of it.

It is said the proposed stoppage of contraband wares at the source, would incidentally work to the advantage of the belligerent best supplied with such contraband wares at the start. That is true, and this fact may or may not be of vital importance to one of the belligerents. To be of vital importance, other conditions between them must be assumed to be equal, and the difference in the supply on hand of the respective sides at the start must not only be considerable, but irremediable, *i. e.*, so great that the side taken at a disadvantage can not possibly overcome it even by the utmost efforts of its working population and the utmost exploitation of its own natural resources. The argument is insidious. It appeals to the naturally human sympathy in all of us with the under-man. The argument assumes that the nation which is unprepared, whether through slothfulness, ignorance, surprise or whatnot, ought for that reason alone to be entitled to the aid of neutrals. It takes no account at all of the justness of the war

and utterly contradicts the fundamental conception of the neutrality of states. That a nation is short of a ready supply of certain contraband goods at the outbreak of the war is of no concern to neutral states that are friendly to both belligerents. If it is said the system we propose might under certain conditions tend to assure victory to the best prepared belligerent, *the same is true under the present system and will be true under any system.* The belligerent that is now best prepared at the start in naval forces and that can by reason of this superiority drive his enemy's ships from the seas, is the sole beneficiary of the freedom of trade in contraband. That is being demonstrated under our very eyes today. The nation that is superior on the sea is favored by the present system. To avail himself to any material extent of the open traffic in contraband, the "weaker" "unprepared" belligerent must not only possess a superior fleet and a large merchant marine, but he must have the money to buy with. The fact is clearly demonstrated by recent events that only wealthy nations with unquestionable credit can go into the neutral markets of the world and buy contraband in sufficiently large quantities to insure victory or change the result of the war. Given accumulated wealth, a large merchant marine, and a superior fleet at the outbreak of the war, is not such a belligerent in fact that one best prepared to avail himself of the traffic in contraband? The form the preparation for war may take need not be accumulated stores of contraband: it may consist in being prepared to take advantage of the licenses and the lacunae in the law of war. Indeed, the belligerent who is thus best prepared on the sea to get contraband may, and usually does, at the start already possess a far greater supply thereof than his opponent. This was proven during the Boer War. The present system usually aids the strong and hinders the weak. The American republics ought all to reject it.

We are told the adoption of this measure would so stimulate the increase of armaments as to make the world an "armed camp." 'Tis a well-worn metaphor and specious. What, indeed, is the world now but an "armed camp"? How often in recent years have we all heard it so described! How can it become more so to any considerable degree? And why should present conditions become worse solely because of a beneficent reform that would remove the cause of so many dangerous international controversies and promote international confidence and good will, and that would itself tend to restrict the

present manufacture of engines and munitions of war by individuals? The worst this passive reform could accomplish is, not an increase in the aggregate of the armaments in the world which has reached its limit, let us hope, but a transfer of the manufacture of such armaments from the hands of armament rings and trusts into the hands of the state—and that is a consummation devoutly to be wished.

The argument is specious in that it tacitly assumes that nations do and will rely upon obtaining support from nominally neutral sources during war and will hence diminish their army and navy, programs proportionately during peace. No nation *does nor can rely* upon obtaining any considerable part of its equipment in a future war from neutral sources. The uncertainties are too great. The neutral state from which the belligerent had expected to draw contraband supplies may prohibit their sale and export. That very state may, indeed, be the future enemy which the confiding belligerent has to fight. Then there is always the uncertainty of political conditions in time of war; the uncertainty of available supply, on the one hand, and of purchasing power on the other; the risk of capture in transit and the irreparable loss of both ships and cargoes, to the eminent advantage of the enemy who will, of course, himself use those ships and contraband cargoes; and finally, there is the uncertainty of finding for immediate use the necessary merchant vessels that will engage in this to them exceedingly hazardous business. No belligerent nation without a large merchant marine of its own that can be commandeered, if necessary, will get more profit than harm out of the present system.

Gentlemen, what has the alleged reliance upon the present system done in the past toward the reduction of armaments? And why the present agitation for greater preparedness in the United States, the wealthiest nation on the globe, if any considerable reliance is put upon the certainty of obtaining a sufficient supply of contraband goods after the outbreak of a future war from neutral sources? *The fact is, nations are and ought to be self-reliant.* They ought to be adequately and efficiently prepared to meet all contingencies that are reasonably probable. It is an absolutely false and slanderous imputation that nations by an adequate and self-reliant preparation against probable aggression, thereby throw overboard all sentiments of international justice and all esteem for international law and proclaim to the world the reign of irresponsible force.

Gentlemen, an address which is supposed to be objective and scien-

tific, would hardly with propriety close with a peroration and appeal. But I can not forego the expression of a wish that nations everywhere would study the questions relating to the traffic in contraband, not exclusively from the viewpoint of national self-interest, but from the broader viewpoint of the welfare of the whole family of nations and of all humanity. I can not refrain from expressing the wish that some American country would take the lead (it need not be the United States) in a world-wide effort to prohibit the sale and export of contraband from neutral territory. What if a nation does thereby exceed the minimum of the legal demands that may now, under an outworn and outgrown European ideal of two hundred years ago, be made of professedly neutral states? The best moral sentiment of the world will sustain every effort to enact this reform. It is right. The present system is vexatious, unfair, dangerous, and wrong in principle and morals.

Gibbon tells us of the ancient Locrians that it was their rule that a Locrian who proposed any new law stood forth in the assembly of the people with a cord around his neck, and if the law was rejected, the innovator was instantly strangled. Gentlemen, Locrians, draw the cord, if you must!